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No. 685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

EDWARD T. BOEHNER,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

EDWARD T. BOEHNER
347 Fifth Avenue
New York 16, N. Y.

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Petitioner respectfully requests the Court to reconsider its order denying his petition for writ of certiorari and on such reconsideration to grant the petition. In support thereof petitioner submits the following grounds available to petitioner and not previously presented.

I

After filing an appeal to the Appellate Division, First Department, from an order of Mr. Justice Marks, Supreme Court, New York County, refusing to review the taxation of costs by the clerk, petitioner filed an affidavit with the Appellate Division, First Department, in which he asked that Court to recuse itself from hearing the appeal. The affidavit stated, at page 7, that a majority of the panel that affirmed without opinion the order by Mr. Justice

Capozzoli granting respondent's motion for summary judgment were judicial members of respondent (and that so were the three other members of the Court), that it would be charitable to call the opinion of Mr. Justice Capozzoli an aberration, and that his order was not rationally supportable; at page 5, that the Appellate Division, First Department, forfeited respect by its conduct in this case; at page 6, that the order of Mr. Justice Marks was not rationally supportable, and his memorandum opinion very odd, since he must have known better; at page 7, that no disinterested court could possibly affirm the order, but that petitioner did not believe he could possibly get a fair review from the Appellate Division, First Department; and, at page 8, petitioner therefore asked that Court to transfer the appeal to another Department. There is no oral argument on motions in the Appellate Division, First Department. The motion was denied on October 1, 1963, without costs. A certified copy of the affidavit and of the order are being filed, simultaneously herewith, with the Clerk of this Court.

The Appellate Division, First Department, could not properly sit on the appeal from the order of Mr. Justice Capozzoli, since six of the eight members of the Court were judicial members of respondent; it should have transferred the appeal to another Department. This was the procedure followed by the Appellate Division, Second Department, in *Brooklyn Bar Ass'n* v. *Kings County Bar Ass'n*, 258 App. Div. 920 (1939), in which, a majority of the members of the Court being members of the plaintiff bar association, the Court disqualified itself and transferred the appeal from the order denying defendant's motion to dismiss the complaint to the Appellate Division, First Department. Instead, the Appellate Division, First Department, made a mockery of the judicial process to protect respondent; so much so, that, as stated above, petitioner said in an affidavit filed with that Court that it had forfeited respect by its conduct in this case.

Where, as here, petitioner tells the Appellate Division, First Department, by affidavit, without rebuke by that Court, not even by an award of the customary costs against him, that the order of summary judgment against him was not rationally supportable, that it would be an act of charity to call the supporting opinion by Mr. Justice Capozzoli an aberration, and that the Appellate Division, First Department, has forfeited respect by its conduct in this case, it can only be because the Appellate Division, First Department, knows that petitioner has not had due process of law.

Respectfully submitted,

EDWARD T. ROEHNER

Dated: March 4, 1964.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

EDWARD T. ROEHNER